U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 June 2006

CASE NO.: 2005-LHC-2046

OWCP NO.: 08-121335

IN THE MATTER OF:

BRIAN NELSON

Claimant

v.

MAR-CON INC.-THUNDER CRANE, INC.

Employer

and

ZURICH AMERICAN INSURANCE CO.

Carrier

APPEARANCES:

JERE J. BICE, ESQ.

For The Claimant

SETH B. MCCORMICK, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Brian Nelson (Claimant) against

MAR-CON INC.-THUNDER CRANE, INC. (Employer) and Zurich American Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 8, 2006, in Lake Charles, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The parties offered five joint exhibits which were admitted into evidence. Post-hearing, Employer/Carrier submitted the deposition of Claimant which has been marked for identification and received into evidence as Joint Exhibit No. 6. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-5), and I find:

1. That the Claimant was injured on June 2, 2002.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on June 3, 2002.

5. That an informal conference before the District Director was held on April 25, 2005.

6. That Claimant received temporary total disability benefits from June 2, 2002 through the present and

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; and Joint Exhibit: JX-___.

continuing at a compensation rate of $241.52. (Tr. 8).

7. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUE

The unresolved issue presented is Claimant's average weekly wage and resulting compensation rate.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed by the parties on April 18, 2006. (JX-6). He verified his past employment from 1990 reflected on his Social Security Administration earnings record. (JX-6, pp. 8-14; JX-1). He earned $2,234.50 in 1994 working for Manpower. (JX-6, p. 14; JX-1, p. 2). In 1995, he suffered a back injury while working for Civil Construction Company & Environmental Services, Inc. for which he received workers' compensation. (JX-6, p. 16). He also reported working for cash in 1995 doing maintenance, painting, bushhogging and carpenter work. (JX-6, p. 17).

Claimant had no earnings reported in 1996 or 1997. (JX-6, p. 19; JX-1). He earned $2,023.32 in 1998 working for F.D. Shay Contractors. (JX-6, pp. 19-20; JX-1, p. 4). He also paint houses in 1998 but had no documentation of his earnings. (JX-6, p. 21). In 1999, he had no reported earnings. He worked for cash payments. (JX-6, p. 21).

In 2000, he had reported earnings of $411.00, but also painted houses for cash. He had no documentation of his earnings. (JX-6, pp. 21-22; JX-1, p. 5). In 2001, he earned $3,206.50 doing painting and carpentry work. (JX-6, pp. 23-24; JX-1, p. 5). In 2002, he earned $32.00 from DST Rentals, Inc. and $525.00 doing tractor work before being hired by Employer. (JX-6, p. 25).

Claimant was hired as a rigger by Employer and attended a one-day training class before reporting offshore on one occasion. His hourly rate of pay was $8.00. (JX-6, pp. 25-26). He earned a total of $224.00 for 28 hours of work. (JX-6, p.

27; JX-4). He testified that rigging and offshore work was new for him which he sought as a career opportunity. He hoped to work a schedule of two weeks on and two weeks off and learn to operate a crane. He was physically and mentally able to perform his duties before his injury. (JX-6, p. 34). He received no overtime pay during his brief employment with Employer. (JX-6, p. 38).

The Contentions of the Parties

The parties further stipulated that Claimant worked for Employer for two days and was paid $8.00 per hour for 12 hours each day and earned $96.00 per day. The parties agree that Claimant did not file income taxes for the five year period prior to his accident/injury. The parties also stipulated that Employer is bankrupt and no records exist demonstrating the earnings of similarly situated employees.

Claimant and Employer/Carrier rely upon the U.S. Fifth Circuit Court of Appeals decision in Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991).

Claimant contends that his average weekly wage should be computed under Section 10(c) of the Act to arrive at a sum which reasonably represents his annual earning capacity at the time of his injury. Specifically, he avers that his average weekly wage should be based on his work schedule of two weeks on and two weeks off, working a total of 168 hours of which 88 constituted overtime hours at $12.00 per hour. The computation yields average monthly earnings of $1,696.00 or an average weekly wage of $424.00 and a corresponding compensation rate of $282.68.

Employer/Carrier agree that Claimant's average weekly wage should be calculated under Section 10(c) of the Act. Employer/Carrier argue that Gatlin teaches that Claimant's earnings history over a period of years prior to injury should be considered to make a fair and accurate assessment of his earning capacity. Id., at 823. They further assert that Claimant's earning capacity absent injury is significantly lower than the minimum compensation rate which is being paid to Claimant. Thus, using Claimant's earnings for the preceding five year period yields an average weekly wage of $22.97 ($5,973.00 ÷ 5 = $1,194.60 ÷ 52 weeks). Using only a three year period of past earnings before his injury yields an average weekly wage of $24.82. ($3,873.00 ÷ 3 = $1,291.00 ÷ 52 weeks). Lastly, Employer/Carrier suggest using only the preceding year's

earnings yields an average weekly wage of $61.65 ($3,206.00 ÷ 52 weeks). (JX-1).

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, 86 F.3d 438, 441 (5th Cir. 1996); Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (CRT) (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are

computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedores v. Gatlin, supra, at 821.

Subsections 10(a) and 10(b) both require a determination of an average **daily** wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings. Claimant was neither a five nor a six-day worker.

In the instant case, Claimant worked only two to three days for Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

The party contending actual wages are not representative of Claimant's earning power bears the burden of producing supporting evidence. Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (CRT)(9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); Riddle v. Smith & Kelly Co., 13 BRBS 416, 418 (1981). The Claimant's testimony may be considered substantial evidence. Carle v. Georgetown Builders, 14 BRBS 45, 51 (1980); Smith v. Terminal Stevedores, 11 BRBS 635, 638 (1979).

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages **at the employment where he was injured** would best adequately reflect the Claimant's earning capacity at the time of the injury; see also Harrison v. Todd Pacific Shipyards Corporation, 21 BRBS 339, 344-345 (1988)(Claimant's good fortune in obtaining employment with Employer is a consideration as well as his brief two-month employment in computing average weekly wage based on average earnings higher than that which was previously enjoyed by Claimant).

In view of the foregoing, I find that the focus in this case should be on Claimant's potential earning capacity and opportunity to earn absent his injury. There is no record evidence that Claimant's employment, albeit brief, was not permanent in nature. I find, but for his work injury, Claimant would have continued to earn new, higher wages and overtime as argued by Claimant. Since the objective of Section 10(c) is to

determine an average weekly wage which reasonably represents the earning capacity of the injured employee **at the time of his injury**, I find and conclude that Claimant's earning power is best reflected in his projected weekly earnings as computed by Claimant. I further find that Claimant's potential to earn at the time of his injury would not be well measured by his past earnings and Employer/Carrier's proposed calculations based thereon. As the Court noted in Gatlin, at 822, "application of section 10(c) is appropriate . . . when otherwise harsh results would follow were an employee's wages invariably calculated simply by looking at the previous year's earnings."

Accordingly, I find and conclude that Claimant's average weekly wage is $424.00 with a corresponding compensation rate of $282.68 ($424.00 x .6667). Claimant's argument that he would have been scheduled for two weeks on and two weeks off is reasonable given the nature of offshore work. He would have been scheduled for twelve-hour days and entitled to overtime after 40 hours each week. Thus, his computation of 80 hours of straight time at $8.00 an hour ($640.00) and 88 hours of overtime at $12.00 an hour ($1,056.00) is reasonable. His total potential monthly earnings would have been $1,696.00 which, if divided by four weeks, yields a weekly wage of $424.00. I find the average weekly wage of $424.00 best adequately reflects Claimant's earning potential at the time of his injury.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for

the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[2] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from June 2, 2002 to present and continuing, based on Claimant's average weekly wage of $424.00, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall continue to pay all reasonable, appropriate and necessary medical expenses arising from

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[2] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 21, 2005**, the date this matter was referred from the District Director.

Claimant's June 2, 2002, work injury, pursuant to the provisions of Section 7 of the Act.

3. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 27th day of June, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge